IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO. 15 OF 2002

in

PETITION NO. A-2111 of 1998

Mr.Jaiprakash Dattatray Patade .. Appellant

vs

Mrs Usha Jaiprakash Patade .. Respondent

..

Mr.N.R.Bubna for Appellant

..

CORAM : S.B.MHASE AND

R.S.MOHITE, JJ

DATE: 7TH SEPTEMBER, 2004.

ORAL JUDGMENT (Per R.S.Mohite, J)

1. This is an appeal filed by the appellant-husband against the respondent-wife impugning the judgment and decree passed by the Principal Judge, Family Court, Bandra Mumbai on 4th April, 2000 in Petition No. A-2111 of 1998 dismissing the husband's petition seeking a divorce under section 13 (1) (ia) of the Hindu Marriage Act, the custody of the two children by

name Neha and Nishant who were born out of the wedlock and were living with the wife and the eviction of the Respondent-wife from the matrimonial home.

2. At the outset, counsel appearing for the appellant upon taking instructions from his client who is present in Court made a statement that he would not like to press this appeal in so far as prayer for the custody of the children is concerned. He stated that his client was not pressing the prayer for the custody as his client's daughter Neha was now 22 years of age and son Nishant was also 16 years of age. He further stated that his client was looking after all the needs of the children.

3. Counsel for the petitioner-husband further stated that in so far as the prayer for a direction against the respondent-wife to vacate the matrimonial home is concerned, there could have been no cause of action to seek such a direction until the decree of divorce was obtained. He states that he would not like to press this prayer in this proceeding at this stage. He states that as regards this relief, his client would like to file a separate proceeding. He seeks liberty to delete prayer clause (b). Petitioner is allowed to delete the prayer clause (b). Amendment to be carried

out forthwith.

4. In the circumstances, the only question that is required to be considered in this appeal is whether the petitioner-husband is entitled for grant of a divorce on the basis of the material on record.

5. A glance at the petition filed before the Family Court, Mumbai would indicate that it was the petitioner's case that the marriage between the parties was solemnised on 19th December, 1980 as per Hindu rites. The first child Neha was born on 11th February, 1982 and the second child Nishant on 24th October, 1988. The petition was filed on the sole ground that the wife was treating the husband cruelly. On the basis of several facts and circumstances mentioned in the petition, it was contended that the petitioner- husband was entitled to a divorce under section 13 (1) (ia) of the Hindu Marriage Act, 1955 which allows for divorce if the respondent has, after the solemnisation of the marriage treated the petitioner cruelly.

6. The relevants facts and incidents on the basis of which divorce was sought can be stated wherein :

a) That after the marriage, the wife sold all her jewellery one by one and when the petitioner-husband questioned her, she threatened to commit suicide. She told him not to ask any further questions in this regard.

b) She took loans from other persons on false grounds without informing her husband. The husband learnt about this, when the creditors approached him for return of their monies.

c) That the husband's friend by name Mr. Vijay Gaonkar had kept his wife's mangalsutra with the Petitioner who gave it to the Respondent for safekeeping. The Respondent prepared a fake ornament and substituted it with the original and thus this fake was returned to Vijay Gaonkar. When this fraud was discovered, the Petitioner had to bring back the mangalsutra from the jeweller and return it to Vijay Gaonkar which caused great humiliation to the petitioner-husband. As regards this incident, when he questioned his wife, she stated that she had committed such an act as she required the money and threatened to leave the matrimonial home if questioned further.

d) She stole two gold rings belonging to the petitioner-husband ;

e) During her pregnancy, when she was carrying Nishant, she threatend the petitioner-husband that she would abort the child and he along with his parents were required to pursuade her not to do so ;

f) On 18th May, 1990 an incident occured while the family was traveling in the train along with son Nishant. The respondent was carelessly standing with Nishant near the door of the train and Nishant fell down at Bandra Railway Station. The wife then travelled to the next station and till she came back, the child had to suffer;

g) That in 1991, the conjugal relationship between the parties completely stopped. This situation was created because the wife was behaving in a completely negligent manner towards the petitioner-husband and towards the two children and had forgotten her duties and responsibilities as a wife. The stoppage of conjugal relationship was on account of animosity between the parties. The wife used to taunt the petitioner-husband by reminding him that he was eating

food cooked by her and that if she did not give him food, he would face a problem. The husband felt humiliated and found that the food was not properly cooked. The petitioner's daughter used to point out that the food was not properly cooked to the respondent and when the daughter used to point this out, the wife used to throw the food and used to say that if they did not like the food, they all could starve.

h) That on 17th March, 1991 the petitioner-husband brought his parents to reside in the matrimonial house thinking that due to presence of elderly persons, there might be peace and a check on the short temper of wife. She however, started pressuring the Petitioner to send his parents back. When the petitioner-husband did not agree to the respondent-wife's demand, she created a scene insulting and humiliating him and pushed the mother of the petitioner out of the house. The petitioner-husband could not tolerate these actions against his parents and he himself left his home alongwith the parents on 1st May, 1991. He returned to his matrimonial house only after his own family urged him to do so after a period of 12 days i.e. on 12th May, 1991.

i) An incident occured in October, 1992 when the family had undertaken a trip to Shirdi. On way to Shirdi, when the bus had stopped, the respondent-wife

went with a few other ladies to buy some fruits and while picking up the fruits, she kept Nishant down and she totally forgot about Nishant when she returned to sit in the bus and it was only after the bus had travelled for 15 to 20 minutes, when the petitioner enquired about Nishant, she realised that she had left him back. The petitioner-husband spent anxious moments till he could get back to Nishant.

j) That apart from lack of any cohabitation, there was no relation of husband and wife between them.

k) That in the several years of matrimonial life, the petitioner-husband could not recollect any moment of happiness or peace nor did they socialise. The husband never used to return back home because of likelyhood of quarrel. He used to go to Siddhi Vinayak temple in order to pray for some peace.

l) That the wife used to sit till 1 a.m. watching TV along with the children and this started having an

effect not only on the children's health but also on their studies. When the husband used to point this out, the wife used to threaten that she would either commit suicide or leave the house for ever. She used to tell her children that their father was useless and not capable for looking after them.

m) That due to the constant taunts of the wife about her cooking the food, the husband got fed up and started eating outside. Since most of his income was spent on the family, he did not had sufficient money to eat outside. He used to borrow and his health deteriorated. He started washing his own clothes so that the respondent was not required to attend to any of his needs. He and his wife started living as strangers under one roof.

n) 11th February 1996 was Neha's birthday. When the petitioner-husband came home from work he brought some choclates for her. He gave the same to his daughter and wished her happy birthday. Next morning, Neha came to the petitioner and returned the choclates and told him that she did not want anything from him. This was done because she was tutored by the wife to do and say so.

o) That the wife used to beat the children if they defied her. When the petitioner-husband intervened, she assaulted him and threatened him that she will come to his office and humiliate him. She also stopped the petitioner from taking the children's

studies and tried to totally cut him off from the children. The petitioner felt depressed and did not feel like going home to face the daily fights and quarrels. The petitioner therefore would go to Shivaji Park or to some other place so that he would . spend minimum amount of time in his wife's company.

p) That on 14th January, 1997 the wife beat Neha mercilessly because Neha had gone to sleep while studying.

q) On 8th April, 1997 the respondent demanded Rs.25,000/- from the petitioner-husband. Since he was not in a position to give such a large amount a fight ensued and the respondent asked the petitioner to take both the children and get out of the house. The petitioner left the matrimonial house permanently.

7. The petition was filed by the petitioner-husband on 2nd November, 1998. It was further stated in this

petition that his wife was serving in the Navy and was financially independent as she was earning Rs.10,000/- per month. The roznama indicates that though the wife was served with copy of the petition, she chose not to file any written statement and remained absent almost throughout the trial court proceeding. The petitioner stepped into the witness box and gave his evidence in which he made a reference to the aforesaid facts as stated in the petition. He was not cross-examined on behalf of the wife. The petitioner-husband also examined two other witnesses one being Mr.Ajay Jadhav who was a neighbour and who deposed that the wife used to quarrel and complain to him about the husband and the husband used to deny the truth of the complaint. He stated about the wife borrowing money from him and not repaying. This witness was not cross examined. The third witness PW 3 Ramesh Gopal Sawant, was the real brother of the wife. He also deposed about the quarrels between the husband and wife. He further stated that she was borrowing money from others and not repaying it. She was beating her children. There is no cross-examination of this witness.

8. By the impugned judgment and order, the Family court, Mumbai dismissed the husband's petition. The trial Court for the sake of convenience divided their

cohabitation into two parts. The first being from the date of marriage till 24th October, 1988 where Nishant was born. Second part according to the trial Court would be after the birth of Nishant on 24th October, 1988 til the date of separation on 8th April, 1997 when the husband left his own matrimonial home. The trial Court referred to authorities which held that refusal of sexual intercourse amounted to cruelty. He however held that sexual life between the parties was normal till Nishant was born and that it was not possible to believe that the wife had ill treated her husband on this count during the first stage. As regards the second stage, he held that the falling down of Nishant on the platform of Bandra Railway Station when the child was with his mother and the leaving of Nishant on the way to Shirdi must have been an accident and could not have been deliberate. He held that in so far as other allegations were concerned, the factum of the respondent taking loans from her neighbours or by forging signature of her senior officers, were artificial and untrustworthy. He concluded that in so far as the story regarding negligent behaviour was concerned, no mother would neglect her own children as it was against human psychology. He concluded that the bare words of the petitioner relating to the allegations could not be

believed. That these allegations could be easily made. He further held that matrimonial breakdown of marriage was not a ground under section 13 of the Act to grant a divorce. The trial Court observed that in so far as lack of sexual life on the part of the wife was concerned, it was for the husband to take the initiative in this regard. He observed that the husband has no where stated in his petition that he had pursuaded his wife to have sexual relations and that she had refused. He concluded that if there was no sex between the parties, the lacuna was due to husband's mental condition. He disbelieved the story that the wife had refused to have sex with the husband.

9. For the said reasons, the Family Court dismissed the husband's petition for grant of divorce.

10. We have perused the entire record and heard both the parties. We find that the reasoning given by the Family court for dismissing the petition are improper and untenable. This is a case where admittedly the husband has left his own matrimonial home which stood in his name and have been purchased by his own money on 8/4/97 it almost 1 1/2 years prior to his filing of the petition for grant of divorce. During this period of 1 1/2 years he was residing with his own family

members. The wife had full and proper opportunity to meet the allegations made by the petitioner against her. However, she chose not to contest the petition. She did not file any written statement and was absent on all except one dates. She chose not to cross-examine the petitioner or his other witnesses. In the circumstances, there was absolutely no reason for the trial Court to doubt the version of the petitioner-husband relating to the several instances and circumstances which according to the petitioner caused him great anquish. There are several instances of cruelty which are stated in the petition and which also find place in the evidence of the petitioner which have been completely missed by the trial Court.

11. For example the petitioner-husband has stated in his evidence that on 17th March, 1981 he had brought his parents to come and reside with him in his matrimonial home in the hope that presence of elderly persons in his home would restrain the short temper of the wife. However, the presence of his parents in his house was not liked by his wife and she pressurised him to send his parents to his brother's house. When he did not agree, she started a fight and insulted him, and his parents and went to the extent of physically pushing his mother out of the house. That

since he could not tolerate this incident, he left the house along with his parents and returned back only after 12 days when he was asked to do so by his own relatives. The facts relating to this incident are unchallenged on behalf of the wife and they are a clear indicator of the mental make-up of the wife. If these facts are accepted, then it would clearly indicate that the wife was behaving in a manner which could said to be cruel within the meaning of section 13 (1) (ia) of the Act.

12. Strife between the spouses can be caused by several small day to day unfair and unreasonable behaviour of one spouse which upsets the other spouse. When such behaviour is continued over a long period of time the same can amount to cruelty. The averments in the petition read as a whole which not only consist of specific incidents but also a description of the general behaviour of the wife, as also narrated in the evidence in the petition in our view indicates that by her day to day behaviour, the respondent-wife had made the day to day life of the petitioner intolerable and this had ultimately resulted in the husband leaving his own matrimonial home to stay with his own relatives. The petitioner has stated that the food given to him was not properly cooked. As thefood was

not proper, on many occasions, he was eating outside the house. He was forced to wash his own clothes. The two children were being tutored by the respondent to turn against the petitioner. An incident was narrated where his daughter returned the choclates brought by the petitioner on her birthday. The petitioner has stated that after his work was over, he never felt like returning to his house and used to roam around at Shivaji Park or at Siddhi Vinayak temple so that he would have to spent minimum time with the respondent. All this evidence indicates that there was an irretrivable break down of marriage on account of cruelty inflicted by the Respondent-wife on the Petitioner-husband. The matter would have been different if the respondent-wife would have come before the Court and explained her behaviour or the cause of her behaviour. In the absence of any such explanation, it would not be proper to place blame for the break down of the marriage on the shoulders of the petitioner. The trial Court was also in error in coming to the conclusion that in sexual matters it was for the petitioner-husband to have taken the initiative and in the absence of averments in this regard, the petitioner's contention that since 1991 the parties had no conjugal relations could not be believed. We feel that this finding is based merely

on conjectures and may be far from the truth. There is nothing on record to cast doubts on the facts as brought on record by the petitioner. It may be worthwhile to state that the petitioner-husband has examined the real brother of the respondent and he has also supported the petitioner's case and has deposed that his sister was beating her children and when he had attempted to advise her, she had asked him to mind his own business and not interfere with her life. In this appeal also, the respondent has remained absent though served.

13. For the aforesaid reasons, we find that the appeal deserves to be allowed. Hence, we pass the following order :

" The appeal is allowed and the marriage of the petitioner-husband and the respondent-wife solemnised on 19th December, 1980 is dissolved by a decree of divorce. In the circumstances of the case, there shall be no order as to costs. "

(R.S.MOHITE, J) (S.B.MHASE, J)